No. 19-16237

In the United States Court of Appeals
For the Ninth Circuit

William Price Tedards, Jr., et al.

Plaintiffs/Appellants

v.

Doug Ducey, Governor of Arizona, in his official capacity, et al.

Defendants/Appellees

On Appeal from the United States District Court
For the District of Arizona
No. 2:18-cv-4241-PHX-DJH
Hon. Diane J. Humetewa

APPELLEE'S RESPONSE TO MOTION TO EXPEDITE

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No good cause exists to expedite briefing and oral argument of this appeal under Ninth Circuit Rule 27-12. Appellants have delayed this litigation with inaccurate pleadings, voluntary extensions, and most recently a premature appeal. Despite their best efforts to render their own case moot through mismanagement, Appellants have more than 16 months left before their claims become moot. Under these circumstances, Appellants cannot show "good cause" for this Court to expedite the current appeal.

In an important development, the district court earlier today issued its ruling denying Appellants' motion for preliminary injunction and granting Appellees' motion to dismiss. While that development underscores the meritlessness of Appellants' claims, it does not change the absence of good cause for expediting the current appeal.

I. This appeal does not involve any of the types of "good cause" listed in Ninth Circuit Rule 27-12.

Ninth Circuit Rule 27-12 provides three examples of good cause warranting expedited review, none of which applies here. The first two involve incarcerated criminal defendants and are not applicable here. The third occurs when "in the absence of expedited treatment, irreparable harm may occur, or the appeal may become moot." 9th Cir.

R. 27-12. Appellants can make neither of these showings.

Appellants cannot establish that their claims face a higher likelihood of mootness without expedited review. Arizona voters will have an opportunity to select the person to complete Sen. John McCain's term on November 3, 2020. The issue in this appeal is whether the State should be compelled to hold a separate election between now and then. Doing so is undoubtedly possible because the 2020 general election is almost *500* days away.

On the subject of irreparable harm, Appellants identify no authority that such harm will occur without an earlier election date. On the contrary, the Seventeenth Amendment expressly provides States with discretion as to the timing of Senate vacancy elections:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That *the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*

(emphasis added). *See also Judge v. Quinn*, 612 F.3d 537, 554 (7th Cir. 2010) ("State law controls the timing and other procedural aspects of vacancy elections."); *Valenti v. Rockefeller*, 292 F. Supp. 851, 855 (W.D.N.Y. 1968), *aff'd* 393 U.S. 405 (1969) ("The Seventeenth

Amendment's vacancy provision explicitly confers upon the state legislatures discretion concerning the timing of vacancy elections.").

Appellants also assert that this case presents "serious constitutional violations" and, therefore, "must be addressed as quickly as possible." Motion at 7. Every constitutional claim is serious, but this Court has never indicated that merely invoking the Constitution entitles a litigant to expedited treatment. Further, a case of "national importance," as Appellants claim this case to be (quoting *Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir. 2018)), is all the more reason to ensure that it is decided carefully, rather than in haste. *See Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 96 F.3d 471, 473 (10th Cir. 1996) (denying request for expedited review in campaign finance constitutional challenge because "the issues are too important to be resolved in haste.").

Finally, now that the district court has ruled, this Court's rules already provide for priority review of preliminary injunction orders. *See* 9th Cir. R. 3-3; 34-3. This is all the more reason to not waste resources on an expedited appeal without case-specific good cause.

II. This Court's decision in *Hamamoto v. Ige* does not support expediting this appeal.

Appellants repeatedly invoke *Hamamoto v. Ige*, 881 F.3d 719 (9th Cir. 2018), which they contend involved "essentially the same questions" and "a similar situation." Motion at 3. This is incorrect. *Hamamoto* involved a challenge to a temporary Senate appointment filed just *five days* before the vacancy election to fill that same Senate seat. *Hamamoto*, 881 F.3d at 721. The plaintiffs in that case did not seek a preliminary injunction. *Id.* Because the case was filed so soon before the vacancy election (such that plaintiffs' claims could not be resolved before that election), the district court held that the plaintiffs' claims were moot before any proceedings in this court. *Id.* at 722. In affirming, this Court rejected the argument that the same issue was "capable of repetition, yet evading review," and cited Ninth Circuit Rule 27-12 to show how a prospective challenger to a temporary Senate appointment might be able to obtain relief before a Senate vacancy election. *Id.* at 723 (internal quotations and citation omitted).

Nothing in *Hamamoto* supports expedited review of this appeal. The Senate vacancy in *Hamamoto* had already taken place, thus mooting not only the substantive issues in that case but also the procedural question whether to expedite. Indeed, expediting *Hamamoto* would have

made even less sense that expediting the appeal here. But the case ultimately has no relevance beyond repudiating the capable-of-repetition argument and demonstrating that sometimes election lawsuits become moot because new elections inevitably follow.

III. Because Appellants failed to take appropriate action to expedite the proceedings below, they cannot show good cause for expediting the current appeal.

Appellants also cannot show good cause to expedite this appeal, as required by Ninth Circuit Rule 27-12, when they did not take appropriate actions below that might have resulted in a quicker decision from the district court. In at least four ways, Appellants caused delay below.

First, in their original complaint and original preliminary injunction motion (dated November 28, 2018), Appellants wrongly asserted that Governor Ducey did not issue a writ for a vacancy election following the death of Sen. John McCain. Dkt. 69 at 7 n. 10.[1] As they now acknowledge, Governor Ducey did in fact issue a writ on September 5, 2018, several months before the filing of the original complaint. Motion at 4-5. This error required Appellants to file an amended complaint and

[1] All docket citations are to the district court proceedings in this case, *Tedards v. Ducey*, No. CV-18-04241 (D. Ariz.).

to withdraw their initial preliminary injunction motion, thus resulting in one month of avoidable delay. Dkt. 11.

Second, after filing their renewed preliminary injunction motion on December 28, 2018, Appellants did not ask the district court for an expedited briefing or hearing schedule. Instead, Appellants asked for, and received, an *extension* of time to file their reply brief in support of their preliminary injunction motion. Dkt. 25. Furthermore, the reason that the district court did not set an earlier date for the preliminary injunction hearing is because Appellants' counsel represented they had "a number of conflicts from February through early April 2019." Dkt. 69 at 1-2 n. 2.

Third, at the preliminary injunction hearing, Appellants were unable to articulate the specific relief to be included in a preliminary injunction order, let alone identify *when* they needed the district court to issue that order in order to provide effective relief. When the district court asked Appellants to "specifically" describe what they wanted the court to do, Appellants vaguely requested that Governor Ducey be required to come forward with some indeterminate "plan" for a Senate vacancy election at some unspecified future date. Ex. A (April 12, 2019

Tr.) at 44:17-45:12. Appellants also suggested that they might file objections to this plan, but again provided no specificity as to when this might occur. *Id*. Had Appellants given the district court a clear answer as to when they believed a Senate vacancy election should take place, as well as when a preliminary injunction should issue in order to make this happen, their premature appeal and Motion to Expedite might have been unnecessary.

Fourth, following the preliminary injunction hearing, Appellants improperly sought a status update by sending an *ex parte* letter, dated June 7, 2019, directly to the district court. Dkt. 64.[2] Only after this attempt was rejected by the district court did Appellants actually file a motion for a status conference. Dkt. 65. After Governor Ducey opposed the motion for a status conference, Appellants elected *not* to file a reply in support of that motion, but instead decided to file their premature

[2] The district court's June 11, 2019 order explained: "The Court is in receipt of a two page letter from Appellants' counsel, Mr. Persoon, dated June 7, 2019. This letter is not styled as a motion or a notice and is written on counsel's law firm's letterhead. Moreover, the letter was not filed on the docket, but rather sent to chambers at the Court's public mailing address. The Court will not consider the arguments or requests made therein, nor will it consider any request that is not properly filed pursuant to applicable Federal and Local Rules." Dkt. 64.

notice of appeal.

If Appellants are correct that the timing of the Senate vacancy election creates an actual risk of irreparable harm to Arizona voters (and the district court correctly ruled it does not), then Appellants should have taken appropriate action below to obtain an expedited ruling from the district court on their preliminary injunction motion. Having failed to do so, Appellants cannot demonstrate good cause for this Court to expedite the current appeal.

CONCLUSION

Appellants cannot show good cause for expediting this appeal, which seeks relief relating to an election that is more than 500 days away. Even if there was some risk of Appellants' case becoming moot, that would be a function of their losing arguments at the preliminary injunction stage and their own mismanagement and delay in the court below. This Court should deny the Motion to Expedite.

DATED this 27th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), I certify that:

This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 2,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Schoolbook 14-point font.

DATED this 27th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 27th day of June, 2019.

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4839-8240-3227

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William Price Tedards, Jr.; Monica Wnuk; Barry Hess; Lawrence Lilien; and Ross Trumble, Plaintiffs, vs. Doug Ducey, Governor of Arizona, in his official capacity, and Martha McSally, Senator of Arizona, in her official capacity, Defendants.	CV-18-4241-PHX-DJH Phoenix, Arizona April 12, 2019 2:02 p.m.

BEFORE: THE HONORABLE DIANE J. HUMETEWA, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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Valenti.

MR. PERSOON: I'm sorry if we did what you perceive to be a shift. I'm not familiar with what the exact brief you're talking about, but what I may say is that I think we raised the argument about the 1968 or bust in response to arguments that were made by the other side.

So as there's an interplay between the advocates, I think that that happens.

THE COURT: All right. And you can continue on.

MR. PERSOON: I'd add, in kind of wrapping up in closing, because I think I'm out of time, and you're being generous.

THE COURT: Well, let me just -- let me just ask you this last question, and then again I'll give you one more chance to make your statement, because I've asked you a number of questions because you've raised a number of issues here.

What is it specifically that you are asking me to do?

MR. PERSOON: I'll go with the claims in reverse order so I can kind of do the easier ones first.

THE COURT: Yes.

MR. PERSOON: I think you should declare that the partisan requirement is unlawful. That's the first thing.

The second is I think that you should declare that the legislature cannot have these requirements on how the executive makes the appointment.

And then, third, the big one about the election, I think you should declare that by waiting more than one congressional term to fill the vacancy by election, that the defendants have violated the Seventeenth Amendment and that you would give them an opportunity to set a status sometime out for them to come in with a plan for a compliant election.

And at that time -- Mr. Liburdi and I have been able to work through a lot of stuff and have had a very collegial working relationship. Assuming he's still representing the governor at that time, we could talk that out in advance, and we'd either say we have no objection to this plan or we'd file an objection to their plan.

THE COURT: All right. Thank you. And you may summarize.

MR. PERSOON: I think it's important to really look at, when you look at the law, everything from the Second Amendment, to the First Amendment, to desegregation of schools, to voting rights, to gerrymandering, there is a body of law that develops, and you cannot ignore that.

And when you look at the Seventeenth Amendment, we've got this idea, when the Constitution is founded, this intense debate about federalism, the three-fifths rule, representation of southern states, and that's all rolled into how we got the Senate, which really was like one of these upper bodies, the Bundestagthe or the Bundesrat, where it represents the states.